UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Lane Johnson, Plaintiff, -v- National Football League Players Association, et al., Defendants.	No. 1:17-cv-05131 (RJS) Judge Richard J. Sullivan

Plaintiff David Lane Johnson's Memorandum of Law in Support of his Motion to Vacate an Arbitration Award

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INTRODUCTION

This Motion to Vacate concerns a corrupt arbitration process, overseen by an illegitimate arbitrator, resulting in an illegitimate arbitration award. Plaintiff David Lane Johnson sought nothing more than to apply the express terms of his arbitration agreement. What he received went so far astray from the agreement's written word that this Court should vacate this award.

Defendants the National Football League Management Council ("NFLMC") and the National Football League Players Association ("NFLPA") bargained for the National Football League Policy on Performance-Enhancing Substances 2015 (the "Policy"). The Policy required Johnson to submit to testing in exchange for the Policy's protections, procedural safeguards, "transparency," and "fair system of adjudication." The National Football League (referenced with the NFLMC as the "NFL") disciplined Johnson under the Policy, and Johnson appealed.

The bastardized arbitration process to which Defendants and arbitrator James Carter forced Johnson to submit bore no resemblance to the express procedures set forth in the Policy's plain language, lacked "transparency," and was not a "fair system of adjudication." Rather, the arbitration process and resulting October 11, 2016 award ("Award") completely disregarded the Policy's terms. The Award did not draw its essence from the Policy and warrants vacatur under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (the "LMRA").

RELEVANT FACTS

I. THE PARTIES

Johnson is a professional football player, whose exclusive bargaining representative is the NFLPA. Johnson Aff. ¶¶ 2-3 (Ex. 1). The National Football League is an unincorporated association of 32 professional football clubs, and the NFLMC represents these football clubs in collective bargaining with the NFLPA. Doc. No. 101; Doc. No. 102.

II. THE POLICY

The Policy seeks to deter player use of certain substances through testing and discipline. Doc. No. 39-1 at 1784.[1] The Policy requires "transparency" in its "procedures," "scientific methodologies," and "appeals process" and promises a "fair system of adjudication." Doc. No. 39-1 at 1785. The Independent Administrator, a "neutral party," administers the Policy and selects players for drug tests, schedules testing, and certifies violations for discipline or administrative action. Doc. No. 39-1 at 1785-86. At all times relevant, Dr. Lombardo was the Independent Administrator. Doc. No. 39-1 at 1810. As a further layer of player protection, the Policy designated Dr. Finkle as the Chief Forensic Toxicologist ("CFT") and the Policy required this "neutral party" to review and certify independently any lab results.

The Policy allows testing under limited circumstances only (e.g., pre-employment, reasonable cause). Doc. No. 39-1 at 1788-90. As to reasonable cause testing, the type of test under which the NFL most recently disciplined Johnson, the Policy states:

> Players who are placed into the reasonable cause program based on a violation of the Policy ***must remain in the program for a minimum of two years or two full seasons, whichever is shorter***, after which the Independent Administrator must either discharge the Player or notify him in writing that he will remain in the program subject to review at a later date.

Doc. No. 39-1 at 1789 (emphasis added).

The Policy required Defendants to select "no fewer than three but no more than five arbitrators" to hear appeals. Doc. No. 39-1 at 1796. Only neutral, "third-party arbitrators not affiliated with the NFL, NFLPA or [NFL] Clubs" shall hear appeals. Doc. No. 39-1 at 1796.

When a player appeals his discipline, the NFL has the initial burden of proving:

[1] The Policy the NFL provided Johnson, with two redactions, is Exhibit 1 to the Amended Complaint. Doc. No. 39-1, authenticated at Zashin Aff. ¶ 3 (Ex. 2). The pinpoint citations to Doc. No. 39-1 refer to the "PageID #" in the upper right corner of the Policy.

- a positive test result;
- that was obtained pursuant to a test authorized under the Policy; and
- that was conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory...

Doc. No. 39-1 at 1799. A positive test result exists only after those three preconditions are met and the CFT verifies the lab's findings and certifies the test result. Doc. No. 39-1 at 1792.

Upon appeal, the Policy requires the NFL to "provide the Player" with an indexed binder containing "relevant correspondence and documentation." Doc. 39-1 at 1800. A player is entitled to seek "additional discovery" from the NFL. Doc. No. 39-1 at 1800. The Policy only limits discovery on two topics: (1) information specific to other players and (2) the Policy's bargaining history. Doc. No. 39-1 at 1801.

III. JOHNSON'S DISCIPLINE HISTORY

On April 23, 2014, Lombardo notified Johnson he tested positive for a prohibited substance. Johnson Aff. ¶ 4. In a May 19, 2014 letter, Lombardo notified Johnson he would be placed in the "reasonable cause" testing program. Ex. 3 (May 19 letter), authenticated at Johnson Aff. ¶ 5. On June 23, 2014, the CFT Finkle emailed Lombardo certifying Johnson's test as positive. Ex. 4 (June 23 email), authenticated at Zashin Aff. ¶ 4. On July 1, 2014, Lombardo notified the NFL that Johnson "was subject to both disciplinary action and reasonable cause testing" and sent Johnson's results to the NFL for administrative action. Ex. 5 (July 1 letter), authenticated at Zashin Aff. ¶ 5; Doc. No. 103 at ¶ 43. On this date -- July 1, 2014 -- Lombardo placed Johnson into the reasonable cause program. Ex. 6 (transcript from Oct. 4, 2016 hearing) at 173-174, authenticated at Zashin Aff. ¶ 6.[2] The July 15, 2014 discipline letter Johnson

[2] Lombardo testified, "I place [Johnson] on reasonable cause testing when I review the final documents, because if the B sample doesn't confirm or if the expert scientist does not agree with the -- with the lab reports, then the test goes away. So there's no administrative action. So I

received confirmed Johnson's July 1 reasonable cause placement, stating Johnson would "remain on reasonable cause testing…" Ex. 7 (July 15 letter), authenticated at Johnson Aff. ¶ 6.

On July 12, 2016, after more than two calendar years in the reasonable cause program, Lombardo directed that Johnson submit to an unauthorized reasonable cause urine test. Johnson Aff. ¶ 7; Doc. No. 103 at ¶ 47. On September 6, 2016, based on an allegedly positive result, the NFL notified Johnson he was subject to a 10-game suspension. Doc. No. 103 at ¶ 56. The CFT Finkle never certified Johnson's 2016 test as positive. Doc. No. 103 at 97. On September 8, 2016, Johnson appealed the pending suspension and "the manner in which the NFL has applied the Policy." Ex. 8 (Sept. 8 appeal letter), authenticated at Zashin Aff. ¶ 7.

IV. THE FUNDAMENTALLY UNFAIR ARBITRATION PROCESS

A. Defendants Disregarded the Policy's Express Arbitrator Provisions

When Johnson appealed his discipline, Defendants violated the Policy because only two arbitrators existed -- not the three to five the Policy required. Doc. No. 103 at ¶¶ 61, 146. Additionally, Defendants appointed the Notice Arbitrator, despite the express Policy requirement that the arbitrators select the Notice Arbitrator. Ex. 9 (appointment letter).[3] The Policy also mandated that the Notice Arbitrator schedule and assign arbitrators to appeals. Doc. No. 39-1 at 1796. In violation of these express provisions, no pool of three arbitrators existed, Defendants

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don't put him on [reasonable] cause until that -- until that is back and it's sent in for administrative action." Ex. 6 at 173-174. The "expert scientist" Lombardo references is Finkle who emailed Lombardo his confirmation of the lab results on June 23, 2014. Ex. 4. Lombardo then sent the case to the NFL for administrative action or discipline on July 1, 2014. Ex. 5.

[3] The NFL refused to produce Ex. 9. Ex. 14 at No. 8. Johnson received it after his appeal concluded, when Defendants filed it in *Pennel v. NFLPA, et al.*, No. 5:16-cv-02889-JRA (N.D. Ohio 2016). The Court may take judicial notice of documents filed in another court. *See Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998).

selected the Notice Arbitrator, Defendants set the schedule, and Defendants assigned arbitrators. Ex. 10 (transcript from Sept. 22, 2016 hearing) at 21:2-14, authenticated at Zashin Aff. ¶ 8.

Defendants initially assigned arbitrator Glenn Wong to Johnson's appeal, but quickly reassigned it to Carter. Zashin Aff. ¶ 9; Doc. No. 103 at ¶ 147. In doing so, Defendants had ex parte communications with Wong that the NFLPA withheld from Johnson. Doc. No. 28 at ¶ 141. By selecting Carter as a Policy arbitrator (in addition to Carter's other conflicts), Defendants violated the Policy's requirement that arbitrators be "unaffiliated with the NFL, NFLPA or [NFL] Clubs." Doc. No. 39-1 at 1796. Unbeknownst to Johnson and undisclosed by Carter, Carter was affiliated and had an existing business relationship with Defendants. Carter served as an arbitrator under the separately defined National Football League Policy and Program on Substances of Abuse ("SOA Policy") at the same time he sat as an arbitrator under the Policy.[4] Ex. 12 (Carter appointment letter); Doc. No. 103 at ¶ 189.[5]

Johnson sought discovery on these Policy violations, including the arbitrator schedule and the identity of the arbitrators and the Notice Arbitrator. Ex. 13 (Johnson's discovery requests) at Nos. 45-47, authenticated at Zashin Aff. ¶ 11. In an effort to conceal its violations, the NFL falsely claimed there was an amendment allowing only two arbitrators (Ex. 10 at 18:19-21:16), but the NFL refused to produce this alleged amendment or any documents addressing the

[4] The SOA Policy includes a similar three to five arbitrator provision, including "affiliated" preclusion, as the Policy. Ex. 11 (excerpts from SOA Policy) at 23, authenticated at Zashin Aff. ¶ 10. The Policy and the SOA Policy are separate collectively bargained agreements and are separately defined by their terms as distinct programs. Doc. No. 39-1 at 1784 (Policy defined to include only the "Policy on Performance-Enhancing Substances"); Ex. 11 at 1 (SOA Policy defined to include only the "policy regarding substance abuse"). Defendants have never defined the Policy and the SOA Policy jointly. The Policy and the SOA Policy by their express terms require a total minimum of six arbitrators (i.e., three unaffiliated arbitrators for the Policy and three unaffiliated arbitrators under the SOA Policy). No other plausible reading exists.

[5] The NFL refused to produce this document to Johnson. Ex. 14 at No. 8. Johnson first received it after his appeal concluded, when the NFLPA filed it as part of this case as Doc. No. 33-3.

identity of the arbitrators or the Notice Arbitrator. Ex. 14 (NFL's discovery responses), authenticated at Zashin Aff. ¶ 12.[6] Carter allowed the NFL to withhold this relevant information. Ex. 15 (ruling) at No. 8, authenticated at Zashin Aff. ¶ 14. The NFL has since admitted that no written amendment to the Policy's arbitrator provisions existed. Doc. No. 103 at ¶ 176.

B. Defendants and Carter Denied Johnson Relevant Information

As set forth above, to establish a positive test, the Policy required the NFL to meet an initial burden – the test was (1) positive (which required the CFT to certify the test results), (2) authorized under the Policy (i.e., a proper reasonable cause test), and (3) conducted in accordance with the Policy and lab protocols and procedures. Doc. No. 39-1 at 1799. Johnson sought discovery on these very topics. Ex. 13 at Nos. 1-7, 17-20, 23-24, 30-31, 41-43, 45-47. The NFL refused to provide virtually all of the information Johnson requested. Ex. 14.

1. Defendants and Carter Denied Johnson Discovery Regarding the CFT

The Policy designated Finkle as CFT and required that he certify all positive test results, but Finkle did not certify Johnson's 2016 test results. Doc. No. 103 at ¶ 97. The NFL refused Johnson's requests for documents regarding the CFT. The NFL claimed Defendants amended the Policy's CFT requirements, but refused to produce the amendment in discovery or during the arbitration. Ex. 6 at 7-16; Ex. 14 at No. 3. The NFLPA also refused to provide Johnson the alleged amendment, directing Johnson to obtain it from the NFL, despite knowing the NFL refused to provide it to Johnson. Zashin Aff. ¶ 15. No such amendment exists.

2. Defendants and Carter Denied Johnson his Testing Records

The Policy required Lombardo to "be available for consultation" to Johnson. Doc. No. 39-1 at 1786. Johnson asked Lombardo to provide him all his communications with Lombardo,

[6] The NFLPA, likewise, never provided Johnson any amendment to the Policy permitting only two arbitrators. Zashin Aff. ¶ 13; Johnson Aff. ¶ 10.

Lombardo's records concerning him, and his testing history documents. Ex. 16 (request), authenticated at Johnson Aff. ¶ 8. Lombardo, at the NFL's direction, rejected Johnson's request, because Johnson filed an appeal. Ex. 17 (response), authenticated at Johnson Aff. ¶ 8.[7] The Policy includes no such limitation. Doc. No. 39-1. Johnson next sought this information from the NFL, which also refused to provide it, deeming Johnson's requests "overbroad, irrelevant, unduly burdensome, and beyond the scope of discovery contemplated by the Policy." Ex. 18 (Sept.16, 2016 NFL email), authenticated at Zashin Aff. ¶ 16.

Johnson immediately notified the NFLPA of Lombardo's and the NFL's refusal to produce his medical records and testing history and reminded the NFLPA of Lombardo's "neutral" and equal obligation to the NFL and the NFLPA. Ex. 19 (Sept. 16, 2016 email to NFLPA), authenticated at Zashin Aff. ¶ 17. The NFLPA never responded to this email or took action to uphold the Policy's required neutrality of Lombardo. Zashin Aff. ¶ 17.

Johnson then included specific discovery requests seeking his testing history, medical records, and documents Lombardo maintained regarding him. Ex. 13 at Requests No. 17-20. The NFL again denied Johnson's requests as "vague, ambiguous, irrelevant, overbroad, unduly burdensome, beyond the scope of discovery…" Ex. 14 at No. 5. Carter, without a basis in the Policy to do so, permitted the NFL to withhold this vital information. Ex. 5 at No. 5.

3. Defendants and Carter Denied Johnson Protocols and Procedures

To demonstrate that the NFL could not meet its initial burden that the lab followed the Policy's protocols, Johnson requested the lab protocols. Ex. 13 at Nos. 1-4. After all, how could

[7] Despite Lombardo's obligation to correspond contemporaneously to the NFLPA and the NFL and seek guidance from both, Lombardo only copied the NFL and not the NFLPA on his response to Johnson. Ex. 17. Johnson sought discovery on Lombardo's communications with the NFL regarding him (Ex. 13 at No. 31), but the NFL refused to provide the communications and amazingly claimed they were protected from disclosure by the "attorney-client privilege." Ex. 14 at No. 5. Carter denied Johnson this relevant information. Ex. 15 at No. 5.

a player challenge whether the lab conducted the test in accordance with the collection procedures and testing protocols without access to the actual protocols? The NFL refused to provide the protocols (Ex. 14 at Nos. 1-2), which refusal Carter initially affirmed (Ex. 15 at Nos. 1-2). On September 30, 2016, however, Carter issued an email "clarification and modification" to his discovery order, which ordered the NFL to produce:

> … any other testing laboratory 'protocols' referenced in the Policy or used by the UCLA lab that were applicable to the testing of samples such as the testing that was done of the sample provided by Mr. Johnson in July 2016, besides the documents contained in the Hearing Binder, the NFL is directed to produce them promptly to Mr. Johnson's counsel and the NFLPA.

Ex. 20 (Sept. 30, 2016 email), authenticated at Zashin Aff. ¶ 18. In response, the NFL lied to Carter (i.e., committed a fraud on the tribunal) by claiming it had produced all the protocols. Ex. 20. Lombardo testified under oath that the NFL did not do so. Ex. 6 at 238:13-18.

By prohibiting his access to the protocols, Johnson could not challenge whether the Collection Vendor, lab, and NFL followed them -- something the Policy expressly gave him the right to do.[8] Doc. No. 39-1 at 1800. Without the lab's protocols, Johnson also could not offer evidence of the lab's violations.[9]

C. Carter Did Not Disclose Multiple Non-Trivial Conflicts to Johnson

Johnson specifically requested information concerning the Policy arbitrators and their assignment and scheduling pursuant to the Policy terms. Ex. 13 at Nos. 45-47. The NFL refused to provide Johnson this information on grounds that it was irrelevant. Ex. 16 at No. 8. Carter

[8] As permitted by the Policy (Doc. No. 39-1 at 1791), Johnson retained a toxicologist to observe his "B" sample test to ensure the lab followed the protocols. Ex. 6 at 137-150. Lombardo and the lab refused to provide Johnson's toxicologist with the protocols. Ex. 6 at 137-150.

[9] For example, Johnson had reason to believe the same lab technician handled both his "A" and "B" samples and that the lab improperly destroyed his specimens, both of which violated the Policy. Doc. No. 39-1 at 1792, 1803.

also denied Johnson's request for the information. Ex. 17 at No. 8. At no time did Carter disclose any conflicts to Johnson. Johnson Aff. ¶ 9; Zashin Aff. ¶ 19.[10]

Approximately two months after Carter issued the Award, Johnson learned Carter's law firm regularly represented the NFL, the NFLPA, and NFL clubs and that his firm actively represented the NFL at the time of Johnson's appeal. Ex. 21 (Dec. 2, 2016 email from Carter), authenticated at Zashin Aff. ¶ 20. The disclosures in Carter's email demonstrate his appointment as an arbitrator violated the Policy's express requirement for "unaffiliated" arbitrators, and Defendants never provided any amendment allowing Carter's appointment.

V. DEFENDANTS HAVE NOT AMENDED THE POLICY

The Policy required an indexed binder of all exhibits the NFL sought to use during the arbitration. Doc. No. 39-1 at 1800. The indexed binder the NFL provided Johnson included a copy of what the NFL purported to be the "relevant" Policy. Zashin Aff. ¶ 3; Doc. No. 39-1. Doc. No. 39-1 does not include a single amendment or modification. Yet, whenever Johnson identified a substantive deviation from the Policy, the NFL argued Defendants had amended the Policy (e.g., the CFT "amendment" and arbitrator "amendments"). Despite Johnson's repeated requests, neither the NFL nor the NFLPA produced the purported amendments during the arbitration process. Doc. No. 103 at ¶ 311; Zashin Aff. ¶ 21; Johnson Aff. ¶ 10.

Furthermore, before an amendment to the Policy could bind the NFLPA and its members, including Johnson, the NFLPA Constitution required that either the NFLPA's Board of Representatives approved the amendment or its members ratified the amendment. Ex. 22 (Constitution) at 19-20, authenticated at Zashin Aff. ¶ 22. No evidence exists that the NFLPA

[10] The NFL denies that "Carter failed to disclose to Johnson any potential conflict of interest prior to Johnson's arbitration nor did he disclose any potential conflicts that he or his firm had." Doc. No. 103 at ¶ 235. However, the NFL cannot produce evidence of any disclosures made to Johnson, because Carter never made any.

Board of Representatives approved or its members ratified the numerous material deviations from the Policy's explicit terms, which Johnson listed in Doc. No. 39 at ¶¶ 111-122.

The NFLPA's membership approved the Policy -- nothing more. No evidence exists that Defendants amended the Policy, let alone that Johnson, or his fellow players, approved, as the NFLPA's Constitution required, the bastardized Policy Defendants applied to Johnson.

LAW AND ARGUMENT

"Arbitration is fundamentally a matter of contract. Courts must rigorously enforce arbitration agreements ***according to their terms***." *Unt'd. Bhd. of Carpenters and Joiners of Amer. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 274 (2d Cir. 2015) (*quoting Amer. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013) (emphasis added)). "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, ***according to their terms***, of private agreements to arbitrate." *Volt Info. Svcs. v. Bd. of Trustees*, 489 U.S. 468, syllabus at ¶ 1 (1989) (emphasis added).

Defendants and Carter exhibited manifest disregard for the Policy's terms. Defendants, with Carter's assistance, corrupted the process, the hearing, and, ultimately, the Award. The resulting Award makes a mockery of the Policy's promise of "transparency" and a "fair system of adjudication." The unique and egregious facts presented here warrant vacating the Award.

I. THIS COURT SHOULD VACATE THE AWARD UNDER THE LMRA

Vacatur is appropriate if the award contradicts "an express and unambiguous term of the contract" or "so far departs from the terms of the agreement that it is not even arguably derived from the contract." *Tappan Zee*, 804 F.3d at 276 (*quoting Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 222 (2d Cir. 2002)); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (vacatur on the basis of manifest disregard "where some egregious

impropriety on the part of the arbitrator[] is apparent"). Vacatur for "manifest disregard" is appropriate where: the standard was clear and applicable to the issue before the arbitrator; the standard was improperly applied; and the arbitrator was aware of the standard and its applicability. *T.Co Metals*, 592 F.3d at 339; *DigiTelCom, Ltd. v. Tele2 Sverige AB*, No. 12 Civ. 3082 (RJS), 2012 WL 3065345, *8-9 (S.D.N.Y. July 25, 2012) (Sullivan, J.). The reviewing court must consider whether the arbitrator's award draws its essence from the agreement to arbitrate. *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009).

The federal common law governs suits under the LMRA. *Textile Wkrs. U. of Am. v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *Coca-Cola Bottling Co. of New York v. Soft Drink & Brewery Wkrs. U.*, 242 F.3d 52, 54 (2d Cir. 2001). Federal courts routinely look to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") for "guidance in labor arbitration cases." *United Paperwkrs Int'l U. v. Misco, Inc.*, 484 U.S. 29, 40, n. 9 (1987); *see also Supreme Oil Co., Inc. v. Abondolo*, 568 F. Supp. 2d 401, 405, n.2 (S.D.N.Y. 2008). This Court sought guidance from the FAA when analyzing questions arising under the LMRA:

> [T]he federal courts have often looked to the [FAA] for guidance in labor arbitration cases, especially in the wake of the holding that § 301 of the [LMRA] empowers the federal courts to fashion rules of federal common law to govern "[s]uits for violation of contracts between an employer and a labor organization" under the federal labor laws.

New York City Dist. Coun. of Carpenters v. Angel Constr. Group, LLC, No. 08 Civ. 9061 (RJS), 2009 WL 256009, *4-5 (S.D.N.Y. Feb. 3, 2009) (Sullivan, J.) (*citing Misco*, 484 U.S. at 40, n. 9 (internal citations omitted)). The FAA enumerates the following grounds for vacatur:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

> pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); *New York City Dist. Coun. of Carpenters v. Gotham Installations, Inc.*, No. 13 civ 5659 RJS, 2013 WL 5943986, *5-6 (S.D.N.Y. Oct. 24, 2013) (Sullivan, J.).

The deference courts show arbitrators is not a grant of limitless power. *Leed Arch. Products, Inc. v. Unt'd. Steelwkrs. of Amer.*, 916 F.2d 63, 65 (2d Cir. 1990). An arbitrator's authority to resolve disputes under a labor contract is contractual and limited to the powers the agreement confers. *Torrington Co. v. Metal Prods. Wkrs. 1645*, 362 F.2d 677, 680, n. 5 (2d Cir. 1966); *see also United States of Amer. v. Int'l Bhd. of Teamsters*, 954 F.2d 801, 809 (2d Cir. 1992) (an arbitrators power is both "derived from and limited by" the collectively bargained agreement). "An arbitrator may not shield an outlandish disposition of a grievance from judicial review simply by making the right noises -- noises of contract interpretation" nor may he dispense his own brand of industrial justice. *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (internal quotations omitted); *Unt'd Steelwkrs. of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

A. <u>Defendants, with Carter's Assistance, Obliterated Substantive Policy Rights</u>

The "manifest disregard" standard applies where the arbitrator disregards the agreement to arbitrate itself. *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 77 (1st Cir. 2008). An arbitrator may not rely on extrinsic evidence or past practice to rewrite unambiguous provisions. *See NFLMC v. NFLPA, 820 F.3d 527, 532, 537 (2d. Cir. 2016) ("Brady")* (*citing Misco, Inc.*, 484 U.S. at 38) (court's duty to ensure the arbitrator "did not 'ignore the plain language of the contract'"); *see also CP Kelco US, Inc. v. Int'l Un. of Op. Engs.*, 381 Fed. Appx. 808, 814 (10th

Cir. 2010) (*citing Star Tribune Co. v. Minn. Newspaper Guild Typogr. Un.*, 450 F.3d 345, 348 (8th Cir. 2006)) (holding that an award may be vacated "if the arbitrator ignored or disregarded the plain language of an unambiguous contract or nullified a provision of the contract"). Carter enabled Defendants to conjure a sham arbitration process to produce their desired result. When Johnson attempted to expose Defendants' corruption, they responded with more corruption.

1. Defendants Disregarded the Policy's Express Arbitrator Provisions

Courts' rigorous enforcement of labor arbitration agreements includes enforcing the rules under which the parties will conduct the arbitration. *Amer. Exp. Co.*, 133 S.Ct. at 2309; *see also NFL Players Ass'n v. NFL*, 831 F.3d 985, 998 (8th Cir. 2016) (the parties are bound to the procedure for which they bargained). By appointing the Notice Arbitrator, not retaining the minimum of three unaffiliated arbitrators the Policy required, and selecting Carter to hear Johnson's appeal, Defendants decimated the Policy's system for the neutral and random assignment of unaffiliated arbitrators. In effect, Defendants improperly "cherry picked" the arbitrator for Johnson's appeal. As an improperly seated arbitrator, Carter completely lacked the authority to hear Johnson's appeal. That Carter restricted Johnson's access to documents demonstrating Carter's improper selection proves his bias. Ex. 15 at No. 8. For these reasons alone, this Court should vacate the Award.

2. Carter Did Not Apply the Policy's Burden-Shifting Paradigm

The agreement to arbitrate often determines the procedural rules that the arbitrator must apply in resolving the underlying dispute. *Kashner*, 531 F3d at 77. "If the arbitrator ignores the plainly stated procedural rules incorporated in the agreement to arbitrate while arriving at the arbitral award, that award is subject to a manifest disregard of the law challenge." *Id.*; *see also*

Patten v. Signator Ins., 441 F.3d 230, 235 (4th Cir. 2006) (arbitrator acted in manifest disregard where she disregarded the plain and unambiguous language of the arbitration agreement).

The Policy required that the NFL meet an initial burden to demonstrate that Johnson's test was "positive" (including certification by the CFT), "authorized under the Policy," and resulted from a test "conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory." Doc. No. 39-1 at 1792, 1799. To date, the NFL has never done so. The Policy clearly identifies Finkle as the CFT (Doc. No. 39-1 at 1890), but Finkle never certified Johnson's test result. Doc. No. 103 at 97. Carter denied Johnson evidence of a purported amendment regarding the CFT certification. Ex. 15 at No. 3. The undisputable evidence demonstrates the NFL never produced a "positive" test for Johnson in accordance with express Policy terms. As a result, the NFL never met its initial burden of proof.

Johnson specifically asked Carter to enforce the Policy's burden-shifting paradigm and vacate his discipline because the NFL failed to meet its initial burden under the Policy. Ex. 6 at 163:4-24, 263:21-264:4. Carter refused to do so and impermissibly relieved the NFL of its burden in contravention of the express Policy language. Doc. No. 39-2; Ex. 6 at 163:25-164:3.

3. Carter Relied on Information He and the NFL Refused to Provide to Johnson as the Basis for the Award

The NFL, with the NFLPA's consent, prohibited Lombardo from providing Johnson his medical records and Policy testing history, calling them "irrelevant." Ex. 14; Ex. 18; Ex. 19. Carter upheld the NFL's refusal. Ex. 15. Yet, during the October 4, 2016 hearing, the NFL presented a summary of Johnson's alleged reasonable cause testing history -- "Exhibit I" -- that Lombardo prepared from the records the NFL refused to give to Johnson. Ex. 6 at 226:1-2.

Carter condoned the NFL's actions. Ex. 15 at No. 5. Johnson objected to Exhibit I,[11] but, despite that objection, Carter relied upon Exhibit I to deny Johnson's appeal. Ex. 6 at 49-50; Doc. No. 39-2 at 1839 (Carter relied on Exhibit I to determine the critical issue of the date Lombardo placed Johnson in the reasonable cause program).[12] Without access to his testing history, Johnson could not demonstrate that Lombardo kept him in the reasonable cause program for more than two years in violation of the Policy's express terms. Doc. No. 39-1 at 1789. As a result, Lombardo subjected him to a test not authorized under the Policy.

B. Carter's Nontrivial Conflicts and His Failure to Disclose Them Require that the Award be Vacated

1. Carter's Failure to Disclose Actual Conflicts Demonstrates Partiality

The Second Circuit's standard for arbitrator "evident partiality" arises from the Supreme Court's *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145 (1968) decision, as applied by the Second Circuit in *Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2d Cir. 1984). In *Commonwealth*, the Supreme Court vacated an award because the arbitrator did not disclose "close financial relations" that existed between him and one party "for a period of years." *Id*. at 147. The majority opinion stated:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by ***the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias***.

Id. at 149 (emphasis added). The *Commonwealth* majority relied on the concurring opinion, which explained:

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[11] Johnson testified Exhibit I was inaccurate and did not include his complete testing history. Ex. 6 at 108-109.

[12] When Johnson asked Lombardo, who places players into the reasonable cause program, when he placed Johnson in the program, Carter shielded Lombardo from answering. Ex. 6 at 223-224.

> …that ***where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.*** If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.

Id. at 151-152 (emphasis added). The Second Circuit, citing *Commonwealth*, held that "'evident partiality' … will be found where a reasonable person would have to conclude that an arbitrator was partial to one party." *Morelite*, 748 F.2d at 84; *see also DigiTel*, 2012 WL 3065345 at *11.

In *Appl'd Indust'l Mat. Corp v. Ovalar Makline Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007), the Court vacated an arbitration award where an arbitrator only partially disclosed conflicts and omitted an ongoing matter in which the arbitrator had a pecuniary interest. The Court instructed that evident partiality exists "when one of the parties was a regular, if sporadic, customer of an arbitrator, who failed to disclose that fact." *Id.* at 136. Evident partiality exists where there is an "ongoing business arrangement with a party or its law firm." *Scandinavian Reinsurrance Co. LTD v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 74 (2d. Cir. 2012). Even without the express Policy language forbidding "affiliated" arbitrators, Carter's service as an arbitrator under the SOA Policy and his law firm's ongoing representation of the NFL was an "ongoing business arrangement" with Defendants. Carter's failure to make any disclosure is even more problematic.

"An arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite*'s evident partiality standard: A reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side." *Ovalar*, 492 F.3d at 137. Expanding on *Morelite*, the Court then held that:

> arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. It therefore follows that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed

> under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.

Id. at 138. The Court instructed: "when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality." *Id*.

2. Carter's Failure to Disclose Contradicted Established Arbitrator Standards, including those Set Forth in Carter's Book

Carter himself included the established disclosure duties of arbitrator conduct in his book -- "International Commercial Arbitration in New York," ed. James H. Carter & John Fellas, Oxford University Press, 2013. In Section G of Chapter 5, titled "Conflicts Checks and Arbitrator Disclosures," which Carter wrote, he instructs:

> The AAA/ABA Code of Ethics and all international arbitration rules ***require*** arbitrators to disclose any interest or relationship likely to affect their impartiality.

Ex. 23 (excerpts from Carter's book, arrows added) at 131-132 (emphasis added). Carter explains that an arbitrator who is a member of a firm "must conduct a conflict check" and:

> The Second Circuit has interpreted the ***Federal Arbitration Act to impose an affirmative obligation on prospective arbitrators to search their records for and disclose all "nontrivial" conflicts if the arbitrator has reason to believe that such a conflict of interest might exist***. The court nevertheless cautioned:
>
> > We emphasize that we are *not* creating a free-standing duty to investigate. The mere failure to investigate is not, by itself, sufficient to vacate an arbitration award. ***But, when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality***.

Ex. 23 at 132 (*citing Ovalar*, 492 F.3d at 138 (emphasis added and in original)).

Carter, ignoring the Second Circuit and his book, made no disclosures to Johnson. This is more striking given that Carter made a disclosure of potential conflicts as part of Michael Pennel Jr.'s appeal of NFL-issued discipline in December 2016 (i.e., two months after Johnson's October 2016 arbitration hearing). Ex. 21.

In December 2016, Carter grudgingly disclosed that his firm WilmerHale represented clients engaged in ongoing "transactions…with the NFL, the NFL Players Association, NFL teams or owners or NFL players or other personnel," but did not disclose his pecuniary interests. Ex. 21. Carter's incomplete disclosure in the Pennel matter included references to his firm's current representation of an NFL club in an "ownership matter…of which he was aware," but provided no facts or investigation into that or other potential sources of conflicts. Ex. 21. Even without the express Policy language concerning "unaffiliated" arbitrators, Carter's failure to disclose these ongoing potential conflicts to Johnson in October 2016 when he deemed them necessary in December 2016 is alone evidence of partiality.

But, the express Policy language went further than what the Second Circuit requires. The Policy required the Defendants to appoint "third-party arbitrators not affiliated with the NFL, NFLPA or [NFL] Clubs." Doc. No. 39-1 at 1796. As detailed above, after his appeal concluded, Johnson learned Carter was affiliated with Defendants as an SOA Policy arbitrator and that his law firm was representing the NFL. Ex. 12; Ex. 21. Carter's joint service under both policies violates the Policy and his law firm's work violated the express Policy language.

Carter's failure to disclose to Johnson his joint service under both the Policy and the SOA Policy and his law firm's work on behalf of the NFL evidences his potential bias. As a "neutral arbitrator" the Policy prohibited Carter from any "affiliation" with the NFL, NFLPA, or NFL Clubs, and Carter had an unquestionable duty to disclose to Johnson all facts and relationships raising reasonable doubts about his impartiality. Carter disclosed nothing. Johnson Aff. ¶ 9.

C. Carter's Demonstrated Bias Resulted in an Award that Does Not Draw its Essence from the Agreement

A reviewing court's primary inquiry is whether the arbitrator's award draws its essence from the agreement to arbitrate. *ReliaStar*, 564 F.3d at 85. "A conclusion of partiality can be

inferred from objective facts inconsistent with impartiality." *Scandinavian*, 668 F.3d at 72 (*citing Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423, n.2 (2d Cir. 1986) (internal quotes omitted)). Carter's rogue actions support such an inference. The *Morelite* standard does not require proof of a conflict of interest, but relies on a "case-by-case objective approach in preference to a dogmatic rigidity" and "consider[ation of] all the circumstances." *Scandinavian*, 668 F.3d at 72 (*citing Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) and *Ovalar*, 492 F.3d at 137).

1. Carter Refused to Require the NFL to Produce Relevant Documents

Johnson requested documents relevant to his rights under the Policy. Ex. 13; Ex. 16. The NFL refused to provide them, claiming they were irrelevant or, falsely, that the Policy denied Johnson access to them. Ex. 14; Ex. 17. At the September 22, 2016, discovery hearing, Johnson again requested information regarding: arbitrator selection and scheduling; Policy amendments; applicable protocols; and his Policy testing medical records. Ex. 10 at 5:23-6:25. Each inquiry proved prescient. However, Carter's Ruling on Discovery Requests and Objections violated the Policy by placing limitations on discovery not included in the Policy and went to the heart of Johnson's appeal. Ex. 16; Doc. No. 39-1 at 1800-01.

Carter denied Johnson access to virtually all relevant information vital to his defenses. Ex. 16. Carter denied Johnson information concerning arbitrator selection and assignment. Ex. 16 at No. 8. Unbelievably, Carter denied Johnson's request for the alleged amendment eliminating the "neutral" CFT test certification requirement, even during the October 4, 2016 arbitration hearing. Ex. 6 at 7-16. Based on the unsubstantiated representation of the NFL's in-house counsel (which conflicted with information the NFL provided) and without seeing the

alleged written agreement, Carter concluded that Defendants amended the Policy to eliminate the CFT test certification. Ex. 6 at 16; Doc. No. 39-2.

2. Carter Allowed the NFL to Ignore his Order without Consequence

The NFL committed a fraud on the tribunal when it lied to Carter that it had produced the protocols that Carter's September 30 "clarification and modification" ordered it to produce. Ex. 20. It was clear during the October 4, 2016 hearing that, in defiance of Carter's order, the NFL did not provide the protocols applicable to Johnson's tests. Ex. 6 at 238:13-18.

Johnson objected to the NFL's refusal to comply with Carter's September 30 order and asked Carter to take a negative inference against the NFL. Specifically, Johnson asked that Carter find that the NFL's refusal to produce the protocols meant that they were not followed and that the NFL had not met its initial burden. Ex. 6 at 254-258. Carter validated the NFL's fraud by refusing to take an adverse inference, allowing the NFL to flout his order, and concluded that the NFL met its burden to show the protocols were followed. Doc. No. 39-2.

In *Kinkade*, the Sixth Circuit upheld vacatur of an arbitrator's award for evident partiality. *Thomas Kinkade Co. v. White*, 711 F.3d 719 (6th Cir. 2013). Years into an arbitration, a party (White) retained the neutral arbitrator's law firm for lucrative engagements. *Id.* at 722. The arbitrator promptly notified the other party (Kinkade) of the retention. *Id*. at 724. Subsequently, the arbitrator allowed White to rely on documents White previously refused to produce to Kinkade, refused to apply express contract terms, or respond to Kinkade's objections. *Id*. at 722-24. The Court held "Kinkade established a convergence of undisputed facts that, considered together, show a motive for [the arbitrator] to favor the Whites and multiple, concrete actions in which he actually appeared to favor them." *Id*.

Carter's actions displayed bias through imposition of discovery restrictions that did not exist in the Policy, refusal to require the NFL to produce relevant documents, rejection of the burden-shifting paradigm, and his refusal to require the NFL to produce alleged Policy amendments and the protocols. Carter's evident partiality toward the NFL and bias against Johnson demands vacatur of the Award.

D. Carter Exceeded His Powers Throughout the Arbitration

The Supreme Court's standard for vacatur under 9 U.S.C. § 10(a)(4) is coterminous with the "essence" test articulated for vacatur under the LMRA in the *Steelworkers* Trilogy. *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-672 (2010); *see also Am. Postal Wkrs. U. v. U.S. Postal Svc.*, 754 F.3d 109, 112-13 (2d Cir 2014) (the LMRA "essence of the agreement" standard is the same as the "excess of powers" standard under FAA § 10(a)(4)). Carter exceeded his Policy authority by creating limitations on Johnson's access to discovery, contrary to express Policy terms. The arbitrary nature of Carter's discovery decisions are amplified by his denial of information to Johnson on grounds of "irrelevance" and subsequent decision to admit the same information when offered by the NFL (i.e., Exhibit I). Carter also exceeded his authority by voiding the Policy's burden-shifting paradigm. Furthermore, Carter knew his selection to hear Johnson's appeal did not comport with the Policy. Although Johnson requested information concerning the number, identities, and selection of arbitrators under the Policy, Carter denied Johnson's request, never disclosed his conflicts, and denied Johnson access to information regarding his improper appointment.

Carter repeatedly exceeded his authority by deviating from substantive Policy provisions. Each instance significantly prejudiced Johnson and denied him a full and fair adjudication. The Court should vacate the Award, because Carter exceeded his authority under the Policy.

II. THE ARBITRATION PROCESS LACKED FUNDAMENTAL FAIRNESS

The Second Circuit has evaluated fairness claims under actions for vacatur under Section 301. *See Brady*, 820 F.2d at 546*; see also Bell Aerospace Co. Div. of Textron v. Local 516*, 500 F.2d 921 (2d Cir. 1974). In this case, the Policy guaranteed Johnson "transparency" and "a fair system of adjudication." Doc. No. 39-1 at 1785. To vouchsafe those guarantees, the Policy entitled Johnson to a minimum of three neutral and unaffiliated arbitrators, a neutral Independent Administrator, and a test result certified by the neutral CFT. The Policy also expressly required fundamental fairness by setting a specific initial burden on the NFL. That burden entitled Johnson to challenge that the test result occurred in accordance with established lab protocols and to discovery to obtain documents necessary to raise those defenses. Carter's actions, with the Defendants' misconduct, resulted in a fundamentally unfair system of adjudication.

III. DEFENDANTS' CONDUCT REQUIRES VACATUR OF THE AWARD

Even if the above is not dispositive, a bargaining unit member may seek vacatur under the LMRA by alleging facts demonstrating both that (1) his employer breached its collective bargaining agreement and (2) his union breached its duty of fair representation. *See Domnister v. Exclusive Ambulette, Inc.*, 607 F.3d 84, 87 (2d Cir. 2010). Both occurred here and are alternate grounds for vacatur.

A. <u>The NFLPA Breached its Duty of Fair Representation</u>

Vacatur is appropriate where a union's breach of its duty of fair representation ("DFR") seriously undermines the integrity of the arbitral process. *Roy v. Buffalo Phil. Orch. Soc., Inc.*, 628 Fed. App. 42, *2 (2d Cir. 2017). A union owes its employees "a duty to ***represent them adequately*** as well as ***honestly and in good faith***." *Airline Pilots Ass'n, Int'l v. O'Neill*, 499

U.S. 65, 75 (1991) (emphasis added). A union must "exercise its discretion with ***complete good faith and honesty***, and to avoid arbitrary conduct." *Id*. at 76 (emphasis added).

A union breaches its DFR if its ***actions or omissions*** are (1) "arbitrary," (2) "discriminatory" or (3) "in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The DFR applies to all union activities. *See O'Neill*, 499 U.S. at 77; *see also Breininger v. Sheet Metal Wkrs Int'l Assoc.*, 493 U.S. 67, 89 (1989) (if union wields additional power "its responsibility to exercise that power fairly *increases* rather than *decreases*") (emphasis in original). The plaintiff must show that the union's breach of its DFR "contributed to the arbitrator's making an erroneous decision." *Roy*, 682 F. Appx. at 46 (*quoting Wood v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 807 F.2d 493, 500 (6th Cir. 1986)). A union breaches its DFR when it behaves irrationally. *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974) (*citing Steele v. Louisville & N.R.R.*, 323 U.S. 192, 203 (1944)).

The NFLPA enabled multiple, unratified revisions to the written Policy terms including the minimum arbitrator requirement, the "unaffiliated" arbitrator requirement, and the CFT test result certification requirement. The NFLPA did not produce a written amendment or confirm that its membership ratified or approved any such amendments, as required by its Constitution. Ex. 22 at 19-20. Additionally, the NFLPA unlawfully withheld from Johnson the complete terms of the Policy in violation of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 414 ("LMRDA"). The NFLPA's violation of its own Constitution and the LMRDA supports the conclusion that its conduct was arbitrary, in bad faith, and breached its DFR.

Without the NFLPA's cooperation in these illegitimate deviations from express Policy language, Carter could not have issued the erroneous Award. The NFLPA's misconduct provides further grounds upon which to vacate the Award.

B. The NFL Breached the Policy

The NFL imposed upon Johnson a Policy appeal process that bore no resemblance to the Policy's express written terms. The NFL's de facto repudiation of the Policy started when Johnson filed his appeal and proceeded through the arbitration hearing. In addition to the illegitimate arbitrator selection process and nullification of the CFT test certification requirement, the NFL imposed an effective ban on providing any information to Johnson.

At the September 22, 2016 discovery hearing, NFL attorney Kevin Manara stated the NFL's objection to providing Johnson with lab protocols:

> If [Johnson has] credible evidence [that the protocols were not followed], [he] should tell us what it is. [The NFL will] determine whether we think it's a deviation. If we think it's a deviation, maybe they're entitled to some sort of documents.

Ex. 10 at 28:13-17. When defending the NFL's refusal to provide the allegedly written agreement eliminating the CFT certification requirement, Manara said:

> There is an agreement that sets that forth. I don't believe we have any obligation to provide that to Mr. Johnson or to his attorneys so they can vet the agreement that the Players Association and the Management Council, the bargaining parties, meant.

Ex. 10 at 60:17-21. Even when the NFL determined one of Johnson's appeal arguments had a basis, it concluded, "That doesn't mean that [Johnson] gets to ask for discovery about it. That's just not how our policy works." Ex. 10 at 78: 4-8.

At the October 4, 2016 arbitration hearing, when Johnson renewed his request for all Policy amendments, Manara said: "[s]o if Mr. Johnson has a concern that something wasn't shared with him as a member of the NFL Players Association this is not the forum to raise that concern." Ex. 6 at 9:23-10:1. Manara further stated: "every player is not entitled to have every document in every proceeding." The NFL engaged in a deliberate information whiteout.

Throughout, the NFL's position was that Johnson would have access to only the information the NFL deigned to give him. The NFL denied Johnson a complete and accurate version of the Policy's terms, including amendments, a copy of the protocols, and his personal policy testing records. In short, the NFL repudiated the express, bargained for Policy terms and improperly took control of all aspects of Johnson's arbitration process.

In *Vaca v. Sipes*, the U.S. Supreme Court instructed that:

> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. In such a situation (and there may of course be others), ***the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action***.

Vaca, 363 U.S. at 186. Here, the NFL's actions effectively repudiated the Policy's express written procedures and replaced them with a corrupt process that forced Johnson to pursue his appeal without adequate information and without the benefit of express Policy protections.

The NFL could not have bastardized the Policy's terms without the acquiescence of the NFLPA and Carter. However, the NFL's statements on the record make clear that it had no intention of abiding by the Policy's terms – especially those terms requiring transparency – and the NFL repudiated them. For this additional reason, this Court should vacate the award.

CONCLUSION

Even without the benefit of discovery, Johnson has established a corrupt arbitration process, overseen by an illegitimate arbitrator, resulting in an illegitimate arbitration award. Johnson respectfully requests that this Court grant his Motion to Vacate an Arbitration Award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 25, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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